90-72

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JUDY C. BROWN and LEWIS F. BROWN, Individually And As Next Friends of REIDER P. M. BROWN, A Minor and REISE G. L. BROWN, A Minor, Deceased,
Petitioners

v.

ANDY GRANATELLI, As Trustee of TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN; THE TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN, and NORTH AMERICAN LIFE AND CASUALTY COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Can a Benefit Plan spend plan funds to insure itself against catastrophic loss without including its plan members in that coverage?

2. If a Benefit Plan can spend plan funds to insure itself, can it (Tuneup Masters, Inc.'s plan) purchase an insurance policy against catastrophic loss from an insurance company (NALAC) and then take the position that it, the Plan, is "self insured"?

3. If a benefit plan can "insure itself" and maintain the position that it is self insured but its members are not insured, even though its members are the ones suffering the catastrophic losses in fact and even though it is the members premium dollars that provide coverage for the dependents, can the carrier writing the coverage ignore the mandated benefits laws of the several states (all 50 in this instance) under the theory that it, the insurance company, is not insuring the individual members of the plan but rather the plan itself against the catastrophic losses of its individual members?

4. Can enforcement statutes, employed in conjunction with other statutes used specifically to regulate the business of insurance, be pre-empted by ERISA under the theory that "enforcement statutes do not regulate insurance" and thus are pre-empted?

5. With reference to the *Pilot Life* decision by the United States Supreme Court, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), which decision holds, among other things, that laws directed specifically to the insurance industry are exempted from ERISA but that state laws which are "general" in nature are preempted. Can the Supreme Court, after due reflection continue upholding *Pilot Life* when its decision was predicated, among other things, on the proposition that by referring to the language in the statutes used by Congress and specifically

directed towards the insurance industry, Congress must have intended to exclude any statutes from exemption if they were parallel to similar "general statutes" even when, as in the *Pilot Life* instance, the subject general statutes were designed to discourage unconscionable conduct.

To maintain *Pilot Life*, in its present position under the above reasoning the United States Supreme Court would necessarily be adopting the position that since the several states (across the board) were against unconscionable conduct, as a general proposition and as used in their "general statutes" then Congress must have been casting a vote for unconscionable conduct with reference to any statute directed to the insurance industry when that statute happened to parallel any general statute of any of the several states.

The question then is "if one considers the reasoning in Pilot Life as it relates to "Congressional Intent" and then reviews the language in the McCarran-Ferguson Act can the inconsistency be reconciled?

A LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVERSED AS REQUIRED BY SUPREME COURT RULE 24.1(b)

Parties to the proceeding are as follows:

1. Andy Granatelli, as Trustee of Tuneup Masters, Inc. Employee Benefit Plan
   Los Angeles, California

2. The Tuneup Masters, Inc. Employee Benefit Plan
   Los Angeles, California

3. North American Life and Casualty Company
   Milwaukee, Wisconsin

4. Judy C. Brown, Plaintiff-Petitioner
   Houston, Texas

5. Lewis F. Brown, Plaintiff-Petitioner
   Houston, Texas

6. Reider P. M. Brown, a minor, by and through his next friends, his parents Judy C. Brown, and Lewis F. Brown, Plaintiffs-Petitioners

7. The estate of Reise G. L. Brown, a minor, deceased, Houston, Texas

8. First Fund Insurance Administrators, Inc., a non-party, currently has no direct financial interest in this litigation but is factually involved in this dispute.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ———

JUDY C. BROWN and LEWIS F. BROWN, Individually And As Next Friends of REIDER P. M. BROWN, A Minor and REISE G. L. BROWN, A Minor, Deceased,

Petitioners

v.

ANDY GRANATELLI, As Trustee of TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN; THE TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN, and NORTH AMERICAN LIFE AND CASUALTY COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Judy C. Brown and Lewis F. Brown, in their respective capacities, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above referenced matter on April 11, 1990 as reproduced in the Appendix hereto (App. A at page 1a, which said judgment affirmed a Final Judgment Rendered by the United States District Court For The Southern District of Texas, Houston Division, Honorable Judge Normal L. Black presiding, said judgment entered

in the above referenced matter on January 24, 1989 as reproduced in the Appendix hereto (App. C at page 23a and which judgment was rendered in conjunction with a Memorandum and Order from that same Court and on that same day as reproduced in the Appendix hereto (App. B at page 16a).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit reported at —— F.2d —— (5th Cir. 1990) is reproduced and attached in full as Appendix A. The Memorandum and Order of the United States District Court for the Southern District of Texas, Houston, Division and the Final Judgment of that same Court, which are the subject of the affirmance by the Fifth Circuit are reproduced and attached in full as Appendences B and C respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1990. See App., infra, at 1a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On September 22, 1987, Petitioners filed suit in the 133rd Judicial District Court of Harris County, Texas against Andy Granatelli, As Trustee of Tuneup Masters, Inc. Employee Benefit Plan and the Tuneup Masters, Inc. Employee Benefit Plan. Defendants subsequently removed the case, pursuant to 28 U.S.C. § 1331. Thereafter North American Life and Casualty Company was added as a party defendant.

With permission of the trial judge the parties, having agreed that there was no dispute as to the material facts,

filed cross-motions for summary judgment. After due consideration the trial judge denied the motion for summary judgment of the Plaintiff-Petitioners and granted the motions for summary judgment of the defendants Andy Granatelli, as Trustee of the Tuneup Masters, Inc. Employee Benefit Plan, the Tuneup Masters, Inc. Employee Benefit Plan and North American Life and Casualty Company.

On appeal the Fifth Circuit, after hearing oral arguments, on April 11, 1990 rendered its judgment. (See App. A) affirming the judgment of the trial court.

Factually the case developed as follows: Judy C. Brown gave birth to her first child, a son, Reider P. M. Brown in January of 1986; Reider was severely premature and had serious, permanent physical problems as a result of that prematurity. In November of 1986 the Browns had a second son, Riese G. L. Brown. Reise was also premature and had serious congenital defects. After 5 months in the hospital Reise died. . . . The Browns made a claim for benefits under their group plan as described in a brochure published by the Benefit Plan. Their claim was denied. When the claim was denied the Browns sought relief by filing suit in state court, urging, inter alia, that they were entitled to state mandated benefits under Tex. Ins. Code Ann. art. 3.70-2(E).

The Browns contend, among other things, that the state of Texas has mandated benefits to cover new-born children and that ERISA does not pre-empt the states right to enforce compliance. The Browns further contend that a Plan is prohibited by express provision in ERISA from purchasing an insurance policy to cover the Plan at the expense of the Plan members. The Browns also contend that an insurance policy is an insurance policy and that labeling it "stop-loss" to mask a standard deductible (albeit a large deductible in this case) does not alter the fact that it is still insurance.

REASONS FOR GRANTING THE WRIT

From the time of the adoption of the U.S. Constitution, insurance companies have been subject to state regulation and taxing; a situation fully recognized by the U.S. Supreme Court and as pointed out in *Paul v. Virginia*, 75 U.S. 357 (1869). In 1944 the *S.E. Underwriters* case *United States v. South-Eastern Underwriters Ass'n et al.*, 322 U.S. 533 (1944), created need for the McCarran-Ferguson Act. The Congress clearly demonstrated its intent to keep the insurance industry subject to regulation and taxation by the several states by, within three weeks, passing a bill restoring that power to the states. That particular bill did not clear the Senate but in 1945 Congress passed the McCarran-Ferguson Act, 15 U.S.C. Sec. 1011. In that Act Congress declared that it was in the public interest that the several states continue to tax and regulate the business of insurance. . . . In 1946 South Carolina imposed a tax on Prudential Insurance and that tax was upheld by the U.S. Supreme Court in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). . . . In that case the Court noted that "Obviously Congress purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance . . . and all who engage in it shall be subject to the laws of the several states in these respects." . . . In 1974 ERISA was enacted . . . but did not and does not specifically relate to the business of insurance and therefore does not preempt the McCarran-Ferguson Act. . . . Sec. 1103(c) of ERISA directs that assets of plans . . . "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." . . . In 1978 in *Group Life and Health Ins. v. Royal Drug Co.*, 440 U.S. 205 (1979), the Court set up the three-prong test, quoted from *National Securities, Securities and Exchange Commission v. Nat'l Securities, Inc.*, 393 U.S. 453 (1969), and included "enforcement." . . . In

1985 in *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985), the U.S. Supreme Court said ". . . plans may self-insure or they may purchase insurance for their participants . . . insured plans are directly effected by state law." Couple this with the McCarran-Ferguson Act, ERISA Secs. 1002(1), 1103(c) and 1144(b)(2)(A) and you reach the inescapable conclusion that insured plans are subject to state law. The Tuneup Masters Plan is an insured plan. . . . In 1986 the Sixth Circuit in *Michigan United Food and Commercial Workers Union v. Baerwaldt*, 767 F.2d 308 (6th Cir. 1985), said "The Stop-Loss nature of the plan does not alter our conclusion." (btm p. 312). . . . In 1986 the Ninth Circuit in *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922 (9th Cir. 1986), held opposite to the holding of the 6th Circuit in the *Bearwaldt* case. Petitioners do not argue that plans cannot purchase insurance, be it labeled "stop-loss", "deductible" or whatever. But a plan cannot legally use plan funds to purchase stop-loss coverage to protect itself against catastrophic loss for the simple reason that any plan can eliminate catastrophic risk exposure by simply writing it out of the plan, because ERISA does not control the substantive content of any plan. This allows any plan to "write out" any risk that it does not wish to assume, e.g. "Under no circumstance will this plan be liable for health care expenses in excess of $—— Dollars" (the plan can fill in any desired amount) . . . "Under no circumstance will this plan be liable for health care expenses in excess of the limits of the insurance coverage provided for the members through the plan." Sec. 1103(c) of ERISA says that plan funds can only be used for the benefit of members, dependents and reasonable administrative expenses . . . the funds cannot, repeat cannot, be used to purchase stop-loss coverage to protect against catastrophic loss when the exposure can be eliminated by writing out the risk at no expense to the plan or its members . . . . Contrary to Congressional Intent the *Moore* case allows insurance companies to operate in

an unregulated market in spite of the fact that they are insurance companies, engaged in the business of insurance. Sec. 1002(1) of ERISA doesn't allow it, Sec. 1103 (c) prohibits it and Sec. 1144(b)(2)(A) "saves State Regulation." . . . Consequently the plan is subject to indirect regulation under *Metropolitan*. . . . Self-Insure, as commonly used, means to insure one's self, *i.e.*, for a plan to hold sufficient reserves to cover reasonable contingencies. By purchasing insurance from NALAC the plan insured itself but it did not become self insured. . . . The Browns with one baby dead and over $700,000.00 in unpaid medical bills are living proof of the importance of enforcing mandated benefits laws and an outstanding example of why the insurance industry came up with "stop-loss" coverage as a ploy to escape from state mandated benefits. . . . With a finite number of premium dollars available the insurance industry can only maximize its profits by eliminating high risk coverage. The Ninth Circuit is assisting the insurance industry in that direction with its holding in the *Moore* case. . . . The *Moore* case when coupled with the *Juckett* case, *Juckett v. Beecham Home Improvement Products, Inc.*, 684 F.2d Supp. 448 (N.D. Tex. 1988), compounds the problem by eliminating the ability of the several states to enforce their various mandated benefits under the theory that enforcement statutes are not "regulatory" and are therefore preempted by ERISA. Holding that even if you can apply mandated benefits you can't enforce them. The need for mandated benefits to protect the public was established after many years of overreaching by the insurance industry. Now the Federal Courts through *Pilot Life*, *Moore*, *Juckett* and other similar holdings are destroying the ability of the several states to protect their citizens (the citizens of the United States) from the insatiable greed of the insurance industry at the expense of Lewis and Judy Brown and all others similarly situated.

PROPOSED ANSWERS TO QUESTIONS PRESENTED FOR REVIEW

1. A Benefit Plan cannot spend funds to prevent catastrophic loss unless the coverage is extended to and benefits the individual members.

2. A Plan cannot take the position that it is self-insured by virtue of having purchased so called stop-loss insurance and in so doing deny insurance coverage to its members individually.

3. An insurance company cannot write stop-loss coverage for a benefit plan unless it complies with the mandated benefit laws of the state in which the plan is insured.

4. Enforcement statutes that pertain to the business of insurance are an integral part of the regulation and taxation mechanism that the several states employ and cannot be preempted by ERISA under the theory that they, individually, are not regulatory per se.

5. The U.S. Supreme Court decision in the *Pilot Life* case should be reviewed in light of the expressed intent of Congress in the McCarran-Ferguson Act and modified to comport with that expressed intent.

CONCLUSION

Judge Brown, in his dissenting opinion in Appendix A points out that the majority opinion (App. A) creates a system whereby insurance companies can avoid the operation of the Texas Insurance Code. The Brown family, in this instance, is living proof of what happens to the workers when an insurance company is allowed to operate in a Court Created unregulated market. Allowing the plan members access to the state mandated benefits otherwise available to non-member policy holders will protect them from the profit at any cost operation that has thus far victimized the Browns and will unquestionably victimize countless others unless this Court undoes the harm and havoc created by the holding in *Pilot Life* and the Ninth Circuit holding in the *Moore* case.

Accordingly a writ of certiorari should issue to review the judgment.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-2171

JUDY C. BROWN and LEWIS F. BROWN, Individually and a/n/f of REIDER P.M. BROWN, A Minor, and REISE G.L. BROWN, A Minor, Deceased,

Plaintiffs-Appellants,

v.

ANDY GRANATELLI, As Trustee of TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN; THE TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN, and NORTH AMERICAN LIFE and CASUALTY COMPANY,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

April 11, 1990

Before BROWN, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The Browns appeal the district court's grant of summary judgment in favor of Tuneup Masters Employee Benefit Plan, Andy Granatelli, the Plan's trustee, and

North American Life and Casualty Company which upheld the denial of benefits under the Plan for two of the Browns' children who were born premature with congenital defects. The district court found that the Employee Retirement Income Security Act of 1974 preempted the application of Tex.Ins.Code Ann. art. 3.70-2(E) to the Plan, Granatelli, or NALAC. Article 3.70-2(E) requires individual and group health insurance policies to provide coverage for newborn babies with congenital defects. The district court also found that the Plan was not structurally defective. We affirm the district court's grant of summary judgment in favor of the Plan, Granatelli, and NALAC.

I

The Plan is a group medical plan providing certain health care benefits for employees of Tuneup Masters and their eligible dependents. The Plan has been maintained by Tuneup Masters since 1980 as an employee welfare benefit plan within the meaning of ERISA. First Fund Insurance Administrators administers the plan and is solely responsible for processing and paying the claims of Tuneup Masters' employees and their dependents. Tuneup Masters funds the Plan for all covered employees. The employees pays for the cost of his dependents if dependent coverage is elected.

Mr. Granatelli, as the owner of Tuneup Masters, purchased excess or "stop-loss" insurance from NALAC. Under the policy NALAC reimburses the Plan for claims the Plan pays which exceed $30,000 for any covered individual during the policy year. From the end of 1983 through 1988 only four individuals out of an average of over 800 individuals covered by the Plan yearly submitted claims in excess of the $30,000 stop-loss coverage attachment point. NALAC has no authority to approve claims or otherwise to manage the plan and no authority to approve changes in the plan itself.

In 1985 the Plan was amended in response to the large expense of premature birth. As amended, the Plan excludes coverage for all newborn babies until the 31st day after birth. The Plan also excludes coverage for any baby which on the 31st day is disabled, hospitalized, or sick.

The Browns' first child was born in January 1986. The child was premature with related physical problems requiring extensive medical care and treatment. The Browns' second child was born in November 1986, also premature and with birth defects. He remained in the hospital until his death five monthe later. The Plan refused to pay for the children's treatment because the expenses were incurred during the 30-day waiting period and because the children were not eligible for coverage because of their preexisting disabilities and hospital confinement.

The Browns then filed suit in state court against the Plan and Granatelli. The Plan and Granatelli removed the case to federal district court based upon the presence of a federal question and then joined NALAC as a third party defendant.

The parties stipulated that there were no genuine issues of material fact and moved for summary judgment. The Browns sought the denied benefits and other damages based upon two theories relevant to this appeal; that Tex.Ins.Code Ann. art. 3.70-2(E) required the Plan and NALAC's policy to cover newborns and that the Plan was structurally defective because it did not. The district court denied the Browns' motion for summary judgment and granted defendants' motion, holding that ERISA preempted Article 3.70-2(E) and that the Plan was not structurally defective.

II

The Browns admit that if Article 3.70-2(E) by its letter applied directly to employee benefit plans, its ap-

plication would be preempted by ERISA. In *Metropolitan Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985), the Court held that mandated-benefit laws directly applicable to employee benefit plans are preempted by ERISA. *Id.* at 735 n. 14, 747, 105 S.Ct. at 2387 n. 14, 2393. However, according to the Court, plans which purchase insurance can be indirectly regulated by mandated-benefit laws because ERISA does not prevent those laws from being applied to the insurance policies which plans purchase. *Id.* at 747 & n. 25, 105 S.Ct. at 2393 & n. 25. Although the facts of *Metropolitan* are distinguishable from the facts of this case—the insurance policies at issue in *Metropolitan* were group insurance policies purchased by plans for the plan participants and not stop-loss policies—the Browns argue that under *Metropolitan* Article 3.70-2(E) can be applied to the Plan indirectly through the stop-loss policy it purchased from NALAC. Article 3.70-2(E) cannot require the Plan to provide mandated coverage, and because we conclude that Article 3.70-2(E) does not apply to stop-loss insurance purchased by an employee benefit plan to insure that plan against catastrophic loss, we do not reach the ERISA preemption issues as to stop-loss insurance coverage.

III

Article 3.70-2(E) requires that

> [n]o individual policy or group policy of accident or sickness insurance, . . . which provides for accident and sickness coverage of additional newborn children or maternity benefits, may be issued . . . if it contains any provision excluding or limiting the initial coverage of a newborn infant for a period of time, or limitations or exclusions for congenital defects of a newborn child.

Tex.Ins.Code Ann. art. 3.79-2(E) (Vernon 1981). "Accident and Sickness insurance" is defined broadly as "any policy or contract providing insurance against loss from

sickness or from bodily injury or death by accident or both." Tex.Ins.Code Ann. art. 3.70-1(B)(3) (Vernon 1981).

NALAC argues that an insurance policy purchased by an employee benefit plan to protect that plan from catastrophic loss is not accident and sickness insurance even though it indirectly covers accident and sickness losses. NALAC argues that Article 3.70-2(E) only applies to insurance purchased for sick or injured individuals. With one important qualification, we agree.

Subchapter G of the Texas Insurance Code contains the provisions dealing with accident and sickness insurance. Few if any can appropriately be applied to an insurance policy that reimburses an employee benefit plan for catastrophic loss and does not pay sick or injured persons. *See* Tex.Ins.Code Ann. 3.70-1 to -3 (Vernon 1981 & Supp.1989). The focus of Subchapter G is on protecting sick or injured individuals; Subchapter G has nothing to say about protecting employee benefit plans from catastrophic loss. The statement of purpose in Subchapter G is illustrative. It states:

> The purpose of this Act shall be to provide for reasonable standardization, readability, and simplification of terms and coverages contained in individual accident and sickness insurance policies; to facilitate public understanding of coverages; to eliminate provisions contained in individual accident and sickness insurance policies which may be unjust, unfair, misleading, or unreasonably confusing in connection with the purchase of such coverages or with settlement of claims; and to provide for full and fair disclosure in the sale of accident and sickness coverages.

Tex.Ins.Code Ann. art. 3.70-1 (Vernon 1981). Article 3.70-2(E) fits this statutory scheme, and we decline to apply it to stop-loss insurance purchased by an employee benefit plan to protect itself against catastrophic loss.

That is, we are persuaded that under Texas law stop-loss insurance is not accident and sickness insurance. *Accord Cuttle v. Federal Employees Metal Trades Council*, 623 F.Supp. 1154, 1157 (D.Me.1985) (holding that a stop-loss insurance policy is not group health insurance under Maine law); *cf. United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga*, 801 F.2d 1157, 1161-62 (9th Cir.1986) (holding that because stop-loss insurance is not health insurance for plan participants, a plan which purchases such insurance is not an insured plan subject to state regulation under *Metropolitan*).

Article 3.70-2(E) prohibits health and accident insurance policy provisions that exclude or limit the coverage of newborns with congenital defects. The policy issued by NALAC contains no limiting provisions; NALAC reimburses the Plan for all the losses it incurs up to $1,000,000.00 per person in excess of the $30,000.00 per person stop-loss attachment point. The Plan, however, does not incur any losses because of newborns with congenital defects, and the state is preempted by ERISA from requiring the Plan to include those losses. Section 514(a) of ERISA preempts all state laws which "relate to" employee benefit plans. 29 U.S.C. § 1144(a). At the same time, the preemptive effect of § 514(a) is limited by § 514(b)(2)(A), the "insurance savings clause," which states that, with one exception, nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). The "deemer clause," § 514(b)(2)(B), however, provides that no employee benefit plan "shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of any law of any state purporting to regulate insurance companies." 29 U.S.C. § 1144(b)(2)(B). Because of the deemer clause the Plan's payments to beneficiaries cannot be considered insurance payments. Under *Metropolitan* the mandated benefit law

cannot apply to the Plan itself, but only to health and accident insurance it purchases.

By adopting words of exclusion to express its purpose the Texas legislature plainly intended that coverage be mandated only when the primary coverage of a policy is for health and accident coverage. Here the primary coverage is for the Plan's catastrophic losses. We find additional support for our decision in the language of Article 3.70-2(E) limiting the statute's application to "individual" or "group" accident and sickness insurance policies. "Individual" policies are purchased by an individual for himself and his family. *See* Tex.Ins.Code 3.70-2(A)(3) (Vernon 1981). "Group" policies are purchased by an employer or other qualified organization for a group or individuals and their families. *See* Tex.Ins. Code 3.51-6, sec. 1(a) (Vernon Supp.1989). Read literally, the stop-loss policy purchased by the Plan is not an "individual" or "group" policy since it does not benefit individuals, but the Plan itself.

At the same time, we are wary lest an overly literal reading of the statute frustrate an otherwise manifest legislative purpose. We do not suggest that Article 3.70-2(E) can be avoided by naming an employee benefit plan as the insured on a policy which in reality insures the plan participants. If, for example, a plan paid only the first $500 of a beneficiaries' health claim, leaving all else to the insurer, labeling its coverage stop-loss or catastropsic coverage would not mask the reality that it is close to a simple purchase of group accident and sickness coverage. We look beyond form to the substance of the relationship between the plan, the participants, and the insurance carrier to see whether the plan is in fact purchasing insurance for itself and not for the plan participants, recognizing that as insurance is less for catastrophic loss, it is increasingly like accident and sickness insurance for plan participants. In this case the fact that the Plan has only had to call on NALAC to reim-

burse it for its payments to four individuals in five years supports the Plan's assertion that the insurance is for itself and not for the plan participants. In short, if the Plan were merely a conduit for claims from participants to NALAC we would not reach the same conclusion.

IV

In sum, we hold that Article 3.70-2(E) does not apply to an insurance policy which insures a plan against catastrophic losses. Because all of the Browns' grounds for reversal derive from the failure of the Plan, Granatelli, and NALAC to comply with Article 3.70-2(E), the district court's grant of summary judgment in favor of the Plan, Granatelli, and NALAC is

AFFIRMED.

REAVLEY, Circuit Judge, concurring:

I agree with both of my colleagues that Tuneup Masters Employee Benefit Plan "does not incur any losses because of newborns with congenital defects, and the state is preempted by ERISA from requiring the Plan to include those losses." Having decided that matter, the NALAC policy, which only reimburses the Plan for claims paid in excess of $30,000, presents us with no legal questions and the Browns with no benefits. NALAC insures no one for any claim until the Plan has paid a claim in excess of $30,000. The Texas statute does not rewrite the contract between the Plan and NALAC to provide first dollar coverage, for newborns only, and neither should this court.

I concur in the affirmance.

JOHN R. BROWN, Circuit Judge, dissenting:

Prologue

I agree with the court that the plan does not cover newborns. Consequently the plan is not liable to the

Browns. My real point of difference is that, in my point of view, under Texas law,[1] the policy issued by NALAC is a group policy of accident or sickness insurance thus triggering Texas's mandatory coverage of newborns. Thus NALAC, independent of the plan, is liable to the Browns under its insurance policy.

* * * *

The court's opinion[2] allows insurance companies, authorized to carry on the business of insurance in Texas, which issue policies insuring employee benefit plans, to avoid the operation of the Texas Insurance Code and its mandatory coverage provisions. The court permits this result by characterizing the NALAC policy at issue here as a stop-loss policy. It then holds that this stop-loss policy is not an individual or group policy of accident or sickness insurance even though it acknowledges that the policy indirectly covers accident and sickness losses.

The court makes an attempt to close the loophole its opinion creates by saying it has looked beyond form to substance. It goes on to say that a stop-loss policy which has a stop-loss point of $500 would be treated differently from the policy at issue here, which had an attachment point of $30,000. In other words, a $500 stop-loss policy is insurance while a $30,000 stop-loss policy is not.

The framework thus derived is unacceptable on the facts of this case, contrary to the substance of the Texas

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[1] I claim no superior prescience to that of my colleagues, each of whom was a distinguished Texas practitioner and jurist, one of whom was a long time Justice on the court I urge be importuned if I am wrong or doubtfully correct on my reading of Texas law.

[2] References to "the court" or "the court's opinion" are primarily to the opinion of Judge Higginbotham. However, my dissent goes as well to Judge Reavley's short concurrence which I disagree with because (i) this case presents serious questions of both ERISA and Texas law, and (ii) I believe the Texas statute *does* rewrite NALAC's policy to include the mandated newborn coverage.

Insurance Code, and unworkable as a standard for future cases. For these reasons, I must respectfully dissent.

ERISA Saves State Regulation of Insurance Companies and Contracts

ERISA's broad pre-emption provision provides that:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a), ERISA § 514(a). However this pre-emption provision is modified by § 514(b), the "insurance savings clause," which provides in pertinent part:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.

29 U.S.C. § 1144(b)(2)(A). Subparagraph (B) is the "deemer clause" which exempts *plans* from the operation of state laws regulating insurance. *See Metropolitan*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985).

This statutory scheme and *Metropolitan* pre-empt any state law from regulating the content of the Tuneup Masters Group Insurance Benefits Plan. Thus the Plan was not required to provide coverage for newborns and it is not structurally defective for failing to do so. I agree with the court that the *plan* itself does not provide any coverage for newborns. I agree also, that the plan cannot be held liable for its failure to include such coverage.[3] The Browns are not entitled to any recovery

[3] *See, e.g., Metropolitan*, 471 U.S. at 732-33, 105 S.Ct. at 2386-87, 85 L.Ed.2d at 735-36 ("[ERISA] does not regulate the substantive

against the plan. Thus the district court's entry of summary judgment in favor of the plan was correct.

However, the *plan* and the *policy* may be treated differently. The insurance savings clause leaves NALAC, an insurance company, subject to state law. It is not freed from compliance with Texas's mandated-benefits laws by the pre-emption or deemer clauses in ERISA. *Metropolitan*, 471 U.S. at 740-41, 105 S.Ct. at 2389, 85 L.Ed.2d at 741.

Texas Law Requires Newborn Coverage

Article 3.70-2(E) requires that

> [n]o individual policy or group policy of accident or sickness insurance, . . . which provides for accident and sickness coverage of additional newborn children or maternity benefits, may be issued . . . if it contains any provision excluding or limiting the initial coverage of a newborn infant for a period of time, or limitations or exclusions for congenital defects of a newborn child.

Tex.Ins.Code Ann. art. 3.70-2(E) (Vernon 1981).[4] The court takes the position that the NALAC policy, which it characterizes as a stop-loss policy, is not an "individual or group policy of accident or sickness insurance," and therefore that it need not comply with Art. 3.70-2(E).

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content of welfare-benefit plans.); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490, 497 (1983) ("ERISA does not mandate that employers provide any particular benefits.").

[4] Justice Blackmun informs us that "over the last 15 years all 50 States have required that coverage of infants begin at birth, rather than at some time shortly after birth, as had been the practice in the unregulated market." *Metropolitan*, 471 U.S. at 729, 105 S.Ct. at 2384, 85 L.Ed.2d at 733.

The *Metropolitan* Court informs us that:

> nothing in § 514(b)(2)(A), or in the "deemer clause" which modifies it, purports to distinguish between traditional and innovative insurance laws. The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope. Further, there is no indication in the legislative history that Congress had such a distinction in mind. . . . *In short, the plain language of the saving clause, its relationship to the other ERISA pre-emption provisions, and the traditional understanding of insurance regulation, all lead us to the conclusion that mandated benefit laws . . . are saved from preemption by the operation of the saving clause.*

Metropolitan, 471 U.S. at 741-44, 105 S.Ct. at 2389-91, 85 L.Ed.2d at 741-43 (emphasis added). This is a clear indication that mandated benefit laws, like Art. 3.70-2 (E), are fully applicable to insurance policies and are not pre-empted by ERISA.

"Stop-loss" Coverage Insures a Plan

Unlike the court, and as my principal point of difference, I believe that, *as a matter of Texas, not ERISA*, law the NALAC policy *is* an insurance policy subject to the mandated benefit provision of Art. 3.70-2(E).[5] As

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[5] The only circuits which have addressed the specific question of whether a plan which purchases stop-loss insurance is an "insured" plan under *Metropolitan* such that a state's mandated benefits laws must be adhered to by the insurer are the Sixth and Ninth.

The Ninth Circuit held, in *Moore v. Provident Life & Acc. Ins. Co.*, 786 F.2d 922, 926-27 (9th Cir.1986), that the stop-loss insurer's function was not the "business of insurance." The claims were therefore pre-empted by ERISA and not saved by the insurance savings clause. This rationale was followed in *United Food & Commercial Workers v. Pacyga*, 801 F.2d 1157, 1161-62 (9th Cir.1986). Several district courts have followed the direction of the Ninth Circuit *See, e.g., Drexelbrook Engineering Co. v. The Travelers Ins. Co.*, 710 F.Supp. 590 (E.D.Pa.1989), *aff'd without opinion*, 891 F.2d

the court points out, Texas law defines "accident and sickness insurance" very broadly as "any policy or contract providing insurance against loss resulting from sickness or from bodily injury or death by accident or both." Tex.Ins.Code Ann. art. 3.70-1(B)(3) (Vernon 1981). The NALAC policy provides such coverage. The plan reimburses employees for "eligible expenses" which are listed in a schedule of benefits. This schedule in-

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280 (3d Cir.1989); *Birdsong, et al. v. Olson, et al.*, 708 F.Supp. 792 (W.D.Tex.1989); *Rasmussen v. Metropolitan Life Ins. Co.*, 675 F.Supp. 1497 (W.D.La.1987); *Minnesota Chamber of Commerce & Industry v. Hatch*, 672 F.Supp. 393 (D.Minn.1987); *Bone v. Assoc. Management Services, Inc.*, 632 F.Supp. 493 (S.D.Miss.1986); *Cuttle v. Federal Employees Metal Trades Council*, 623 F.Supp. 1154 (D.Maine 1985); and *Hutchinson v. Benton Casing Service, Inc.*, 619 F.Supp. 831 (S.D.Miss.1985).

I believe the better reasoned approach is that adopted by the Sixth Circuit in *Michigan United Food and Commercial Workers Unions v. Baerwaldt*, 767 F.2d 308, 312-13 (6th Cir.1985), *cert. denied*, 474 U.S. 1059, 106 S.Ct. 801, 88 L.Ed.2d 777 (1986) and *Northern Group Services, Inc. v. Auto Owners Insurance Co.*, 833 F.2d 85, 91 (6th Cir.1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988). The Sixth Circuit found that the "stop loss" nature of the insurance purchased by the plans in those cases was irrelevant—the plans were insured.

> Whether the actual insured is the employer or the ERISA plan, the stop loss insurance is purchased to "provide benefits for plans subject to ERISA." *Metropolitan Life*, 471 U.S. at 738 n. 15, 105 S.Ct. at 2388 n. 15. That the plan pays a deductible does not alter the fact that benefits payable above specified levels, either on an individual beneficiary or in the aggregate, are nontheless insured. *See Baerwaldt*, 767 F.2d at 313.

Northern Group Services, 833 F.2d at 91. Several district courts have likewise followed this approach. *See, e.g., Hall v. Pennwalt Group Comprehensive Medical Expense Benefits Plan*, Civ. Action No. 88-7672, 1989 WL 45627 (E.D.Pa.1989) [1989 U.S. Dist. LEXIS 3018]; *Auto Club Ins. Assoc. v. Mutual Savings and Loan Assoc.*, 672 F.Supp. 997 (E.D.Mich.1987); *State Farm Mutual Automobile Ins. Co. v. American Community Mutual Ins. Co.*, 659 F.Supp. 635 (E.D.Mich.1987), *aff'd without opinion*, 863 F.2d 49 (6th Cir.1988); and *Simmons v. Prudential Ins. Co. of America*, 641 F.Supp. 675 (D.Colo.1986).

cludes many surgical procedures and other treatments that becomes necessary because of sickness or bodily injury.

It is of no importance that NALAC makes its payment to the plan, and not to the individual receiving the benefits. Once the Texas mandatory provision (Art. 3.70-2 (E)) broadens the policy's coverage to encompass newborns, the parents are obvious third party beneficiaries of the policy. NALAC is the source of funds, and NALAC's obligation to pay arises from the sickness or accident of a covered person. Thus NALAC's policy is one of "sickness or accident insurance" and by operation of mandatory Texas law covers newborns.

NALAC's Policy Was a "Group Policy" Under Texas Law

The court further contends that the NALAC policy is not an "individual policy or group policy," so NALAC does not have to comply with Article 3.70-2(E). Once again, I disagree. On my reading of the Texas statute, the NALAC policy has all the earmarks of a group insurance policy. By protecting the plan, NALAC is protecting sick and injured individuals of a defined group—the employees of Tuneup Masters.[6] The policy specifically refers to and relates to the plan. It is a "group policy" because it is

> (1) . . . a policy issued to an employer or trustees of a fund established by an employer, who shall be deemed the policyholder, insuring employees of such employer for the benefit of persons other than the employer.

Tex.Ins.Code Ann. art. 3.51-6, sec. 1(a)(1) (Vernon 1990).

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[6] The Plan describes those covered as the "eligible Employees of the Employer and their eligible Dependents."

Thus I would hold that NALAC's so-called "stop-loss" policy is a group policy of accident and sickness insurance under Texas law. It is therefore statutorily modified to provide the newborn benefits mandated by Art. 3.70-2(E). The medical expenses incurred by the Browns' two infant children are covered. I would find the Browns entitled to recovery against NALAC which was sued as a named defendant in addition to the plan.[7] I would further hold that a $30,000 deductible on this coverage would make it invalid as contrary to the clearly expressed requirement in Texas of mandatory newborn coverage.

If in Doubt, Certainty is at Hand

Finally, if I am wrong on my reading of Texas law, we could and should secure an answer from the only court that can give us a definitive answer to this question of state law. We should certify the state law question to the Supreme Court of Texas.[8]

Because the court's opinion creates a system whereby insurance companies may avoid the operation of the Texas Insurance Code, I must respectfully dissent.

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[7] I re-emphasize that although on my reading of Texas law, the plan was an "insured" plan, no recovery is available against the plan. *Metropolitan* is very clear that state mandatory benefit laws are pre-empted by ERISA from directly regulating the content of a plan. Recovery is available only against NALAC, the insurer, which can be regulated by the state—even when insuring a plan—because of the savings clause which excepts it from ERISA's general pre-emption provision.

[8] Texas Rules of Appellate Procedure 114(a) states that a question of state law can be certified to the Supreme Court of Texas if "it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas." *See Lucas v. United States*, 807 F.2d 414, 418 (5th Cir.1986).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-87-3310

JUDY C. BROWN and LEWIS F. BROWN, Individually and a/n/f of RIEDER P.M. BROWN, A Minor, and REISE G.L. BROWN, A Minor, Deceased,

Plaintiffs

vs.

ANDY GRANATELLI, As Trustee of TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN; THE TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN, and NORTH AMERICAN LIFE AND CASUALTY COMPANY, a/k/a NORTH AMERICAN LIFE AND CASUALTY INSURANCE COMPANY,

Defendants.

MEMORANDUM AND ORDER:

Pending are Plaintiffs' and Defendants' motions for summary judgment. After a thorough review of the pleadings, the briefs, ERISA, and the case law, the Court is of the opinion that Defendants' motions for summary judgment should be granted.

Statement of the Case

This is an action to recover benefits for two children under an employee welfare benefit plan. The plan was drafted to conform to the requirements found in the Employee Retirement Income Security Act of 1974 (ERISA). Mr. Granatelli as owner of Tuneup Masters purchased excess or stop-loss coverage from North Amer-

ican Life and Casualty Company (NALAC) for the benefit of the Plan for claims exceeding $30,000.00 for any individual.

The plan document which sets out the benefits and limitations of dependent coverage states,

> [A] newborn is not eligible for coverage until his/her 31th (sic) day of birth and any benefits hereunder will be subject to any Pre-Existing Limitations set forth in this Plan.

A pre-existing limitation included being disabled, hospitalized, or sick at the time the person would otherwise become eligible. The Browns' first child was born in January, 1986. He was premature and had physical problems. The Browns submitted claims for benefits and were denied benefits based on the "pre-existing conditions" of the infant. The Browns second child was born in November, 1986, also premature and with birth defects. He remained in the hospital until his death five months later. The Plan declined to pay benefits for this child also. The instant lawsuit was then filed.

Summary Judgment

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P. The United States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Discussion

The parties have agreed that there are no material issues of fact in dispute. Only the interpretation of the

law remains to be resolved. The Plaintiffs state three contentions that entitle them to judgment as a matter of law: "(a) because Defendant NALAC is compelled to provide coverage under Article 3.70-2, Tex. Ins. Code and 29 U.S.C. § 1144(b)(2)(A); (b) because any construction of the plan which denied benefits would render the Plan itself structurally defective; and (c) because Defendants' reading of the Plan is arbitrary and capricious as a matter of law.

Tuneup Masters contends that Plaintiffs' state law claims are preempted by ERISA and that, under ERISA, Plaintiffs can not prove that the Plan improperly denied Plaintiffs' claim for medical benefits.

NALAC contends that it is entitled to summary judgment because NALAC's duty only extended to stop-loss coverage for claims that were covered by the Plan. The Plan had no duty to pay these claims, so NALAC had no duty to provide excess coverage for them.

Plaintiffs allege that NALAC is an insurance company that provides insurance to the individuals insured by the Plan; the plan is insured; thus, NALAC must provide for newborn benefits as mandated by Texas law. Article 3.70-2, Tex. Ins. Code and 29 U.S.C. § 1144(b)(2)(A). This argument fails in the face of the Plan Document, ERISA, and prevailing case law. The Plan provides for benefits to the employees in the Plan up to $30,000.00 per employee. NALAC has contracted with Tuneup Masters to pay the employer for claims paid by the Plan in excess of $30,000.00. NALAC provides stop-loss coverage to Tuneup Masters for the benefit of the Plan. ERISA contains a pre-emption clause, a deemer clause, and a savings clause. "ERISA broadly pre-empts state laws that relate to an employee-benefit plan [that is self insured]. 29 U.S.C. § 1144(b)(2); *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724, 747, 105 S.Ct. 2380 (1985). The plan does not lose its status as an employee benefit plan merely because the employer

has acquired stop-loss coverage for the plan. *See Moore v. Provident Life and Accident Insurance Company*, 786 F.2d 922 (9th Cir. 1986). Texas' law mandating that newborns be covered by insurance policies is a law that relates to benefit plans and would be preempted unless it falls within one of the exceptions to the pre-emption clause of ERISA. Article 3.70-2 would not be pre-empted if the document in question is held to be insurance.

Plaintiffs concede that Article 3.70-2 does not apply to the Plan itself. They concede that the Supreme Court has held in *Metropolitan* that the Plan is governed by ERISA which pre-empts state law. But they claim their case is very similar to *Metropolitan*. Plaintiffs contend that Article 3.70-2 does apply to NALAC's policy because NALAC takes over payments for individuals after the plan has paid the first $30,000.00 thus making the plan insured. Plaintiffs contend that since the Plan is insured, NALAC's insurance policy must conform to state law. This is wrong. *Metropolitan*, the insurance company paid benefits directly to Massachusetts residents enrolled in Metropolitan's group policies. In contrast, NALAC never pays an employee directly. The employer must submit a claim to NALAC showing that the Plan has paid a claimant in excess of $30,00.00. NALAC then reimburses the employer for the benefit of the Plan. All payments by NALAC are made only to the employer. Defendants' Plan and stop-loss coverage are almost identical to the coverage supplied the plaintiff in *Moore v. Provident Life & Accident Insurance Company*, 786 F.2d 922, 924 (9th Cir. 1986). Like the situation in *Moore*, "Under the agreement [NALAC] provides only excess or "stop-loss" insurance to the [employer] when claims paid under the Plan exceed a specified aggregate amount in any year." *Id.* The court in *Moore* held that Provident was not an insurance company to the Plan.

> The administrative privileges retained by Provident are not related to the business of insurance and are

> not within the contemplation of ERISA's insurance savings clause.

Id. at 927.

This case law has been cited with approval in this Circuit in discussing the liability of a stop-loss coverage policy. The Courts have held the

> savings clause not applicable to former employee's state law claims for recovery of benefits and punitive damages against an insurance company from which an employee benefit plan purchased stop-loss insurance since the insurance company's role in relation to the benefit plan *insofar as plaintiff's claims were involved* was merely as an administrative overseer since the stop-loss coverage did not go into effect. (emphasis added)

Rasmussen v. Metropolitan Life Insurance Co., 675 F. Supp. 1497, 1502 (W.D. La. 1987), citing *Moore, supra*, and *Hutchison v. Benton Casing Service, Inc.*, 619 F.Supp. 831, 836-39 (S.D. Miss. 1985).

Thus, it is clear that NALAC is not an insurance company as defined by ERISA. NALAC is not compelled to conform to state mandated benefit laws.

Plaintiffs next contend that any construction of the Plan which denies the requested benefits renders the plan structurally defective, or that the Defendants' reading of the Plan is arbitrary and capricious as a matter of law. Both of these arguments must also fail because a careful reading of the Plan Document reveals clearly that newborn infants are not covered for the first 30 days after birth and are then subject to the pre-existing-condition clause before being eligible for coverage.

The Plaintiffs contend that the initial summary of the plan they received from Tuneup Masters—the booklet—conflicts with the Plan Document—the Document—in many material aspects. Plaintiffs have either not read

the two documents, or they are deliberately trying to mislead the Court. It is true that both the booklet and the document require a careful, thorough review to be understood. The Court has given both the necessary review and finds that in the final analysis they both hold that newborns are not covered for the first 30 days.

On page 1 of the booklet, it is stated that, "coverage for a newborn will become effective on the 30th day of birth. On page 2, it goes on to state,

> Eligible dependents will not include . . . any dependent who is disabled, hospitalized or sick on the date coverage would otherwise become effective.

Finally, Plaintiffs wish to prevail on the statement on page 12,

> Infant post-natal care expenses are not covered, other than those for sickness or bodily injury of such infant.

It is clear that the effective date of coverage for a newborn is the 30th day after birth. But, on the 30th day, the newborn must be eligible to be covered. Only after the 30th day, as stated on page 12, does the Plan begin to cover infants for sickness and bodily injury. Contrary to Plaintiffs' contention, on page 30 of the booklet specifically refers to the Plan Document. It states that Plan participants are entitled to obtain copies of all Plan documents and other Plan information.

The Plan document makes it crystal clear on page 29 that,

> [A] newborn is not eligible for coverage until his/her 31th (sic) day of birth and any benefits hereunder will be subject to any Pre-Existing Limitations set forth in this Plan.

The Court has read and reread the booklet and the document. However painful it is, the Court must find

that Tuneup Masters and Andy Granatelli as the trustee have chosen to exclude newborns from coverage by the Plan. The Plan is not in conflict with ERISA or Federal or State Regulations. It has no legal duty to cover any specific group, injury, or illness. The drafters of the Plan chose to cover some illnesses and injuries and to exclude others for the good of all Plan participants. The Plan is not defective. An objective reading of the Plan concerning coverage for newborn babies does not allow for any interpretation, much less one that is arbitrary and capricious. The plain words and their usually understood meaning show that newborns are not covered.

For the reasons stated above, it is therefore

ORDERED that Defendants' motions for summary judgment are GRANTED and Plaintiffs' motion for summary judgment is DENIED.

Signed at Houston, Texas, this 26th day of Jan., 1989.

/s/ Norman W. Black
NORMAN W. BLACK
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-87-3310

JUDY C. BROWN and LEWIS F. BROWN, Individually and a/n/f of RIEDER P.M. BROWN, A Minor, and REISE G.L. BROWN, A Minor, Deceased,

Plaintiffs

vs.

ANDY GRANATELLI, As Trustee of TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN; THE TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN, and NORTH AMERICAN LIFE AND CASUALTY COMPANY, a/k/a NORTH AMERICAN LIFE AND CASUALTY INSURANCE COMPANY,

Defendants.

FINAL JUDGMENT

For the reasons stated in the attached Memorandum and Order, it is

ORDERED that Defendants' motions for summary judgment are GRANTED and Plaintiffs' motion for summary judgment is DENIED.

Each party to pay their own costs.

This is a FINAL JUDGMENT.

Signed at Houston, Texas, this 26th day of Jan., 1989.

/s/ Norman W. Black
NORMAN W. BLACK
United States District Judge